

SERVICE DATE - OCTOBER 10, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33838

METRO REGIONAL TRANSIT AUTHORITY–ACQUISITION
EXEMPTION–CSX TRANSPORTATION, INC.

Decided: October 8, 2003

On May 24, 2000, Metro Regional Transit Authority (METRO), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire from CSX Transportation, Inc. (CSXT) certain railroad assets of a line of railroad between approximately milepost 16.38¹ in Canton, OH, and approximately milepost 40.42 in Akron, OH, in Stark and Summit Counties, OH.² Concurrently, on May 24, 2000, METRO filed a motion to dismiss the notice (and an amended motion to dismiss on July 31, 2003), asserting that the transaction should not be subject to Board jurisdiction because METRO will not become a common carrier as a result of the transaction. There is no opposition to the motion, as amended. The motion to dismiss will be granted.

BACKGROUND

In its original motion to dismiss, METRO stated that it was not acquiring the right or the obligation to conduct freight rail operations on the subject line. Instead, CSXT would retain a perpetual freight railroad easement on the subject line,³ and the acquisition would also be subject to a lease held by the Wheeling & Lake Erie Railway Company (W&LE) over a segment of the line between Canton and approximately milepost 25.55 at Aultman, OH (southern segment).

¹ In its amended motion, METRO states that it subsequently determined, based on valuation station data, that the southern endpoint is located at approximately milepost 16.00, not milepost 16.38, making the total actual distance of the line 24.42 miles. Because the notice will be dismissed, however, the milepost change is not an issue.

² Notice was served and published in the Federal Register on June 23, 2000 (65 FR 39222).

³ Along with this original motion to dismiss, METRO filed a copy of a shared use agreement, dated May 24, 2000, governing operations of METRO and CSXT on the subject line. METRO also attached to its amended motion a copy of its July 1, 2003 shared use agreement with W&LE.

The subject line contains two additional segments. A second segment, over which CSXT discontinued service in 1993,⁴ extends from approximately milepost 25.55 at Aultman, OH, to approximately milepost 33.70 at Krumroy, OH (middle segment). Finally, a third segment extends from approximately milepost 33.70 at Krumroy, OH, to approximately milepost 40.42 at Akron, OH (northern segment).

On May 31, 2000, METRO consummated the purchase of the subject line from CSXT, subject to CSXT's freight easement and W&LE's lease. However, by letters to the Board dated June 7, 2000, and July 11, 2000, W&LE voiced opposition to METRO's motion to dismiss because it had concerns regarding its lease rights and common carrier operations on the southern segment. A lengthy period of negotiation between the parties followed.

On June 24, 2003, METRO and CSXT entered into an agreement by which METRO acquired CSXT's freight easement over the northern segment and leased it to the Akron Barberton Cluster Railway Company (ABC), an affiliate of W&LE. See Metro Regional Transit Authority–Acquisition Exemption–CSX Transportation, Inc., STB Finance Docket No. 34361 (STB served July 11, 2003); Akron Barberton Cluster Railway Company–Lease and Operation Exemption–Metro Regional Transit Authority, STB Finance Docket No. 34362 (STB served July 11, 2003). Pursuant to a June 24, 2003 agreement between METRO and ABC, ABC now provides all freight rail service on the northern segment.⁵

Moreover, METRO has recently exercised a contractual option to have CSXT transfer its freight easement over the southern and middle segments to W&LE as METRO's designee. Pursuant to this arrangement, CSXT will assign to W&LE all of its right, title, and interest in and to the easement, together with any common carrier obligations related thereto.⁶ Simultaneously, CSXT will also assign its right, title, and interest as lessor in the existing W&LE lease of the southern segment to W&LE, thus

⁴ See CSX Transportation, Inc.–Abandonment Exemption–In Summit County, OH, Docket No. AB-55 (Sub-No. 447X) (ICC served Jan. 12, 1993).

⁵ METRO notes that, as a result of this June 24, 2003 agreement, it also became a common carrier with respect to the northern segment. It does not, however, seek here any jurisdictional determination regarding its ownership of that segment after July 2, 2003.

⁶ On August 1, 2003, in Wheeling & Lake Erie Railway Company–Acquisition and Operation Exemption–CSX Transportation, Inc., STB Finance Docket No. 34341, W&LE filed a petition for an exemption to acquire CSXT's freight operating easement over the southern and middle segments owned by METRO. That request will be dealt with in a separate Board decision.

merging that interest with W&LE's lessee interest and W&LE's ownership of the freight easement over the southern and middle segments.

On July 1, 2003, METRO and W&LE entered into the METRO/W&LE Shared Use Agreement to govern the terms and conditions of their respective operations on the middle and southern segments. According to METRO, under this agreement, METRO does not have the right or the obligation to provide freight rail service on the middle and southern segments. W&LE's easement over the southern and middle segments will give it the exclusive right and obligation to provide freight rail service to all customers located along those segments now or in the future. METRO or its designee has the exclusive right to provide passenger rail service on the southern and middle segments.

METRO also indicates that its passenger rail service must not unreasonably interfere with W&LE's freight rail service. Under the agreement, each party may operate only within certain hours. W&LE has the right to operate on the middle and southern segments during an eight-hour time period (10 p.m. to 6 a.m.), six days per week. METRO or its designee has the right to perform passenger rail services on the southern and middle segments during all other times. Either METRO or W&LE may operate in the other's time period upon providing that party with 24 hours' advance notice.

METRO adds that, under the agreement, it is responsible for dispatching all trains on the southern and middle segments once it or its designee begins providing commuter or other non-excursion passenger train service thereon. Until such time, METRO (or its agent) and W&LE will coordinate and control their own trains on the southern and middle segments during each's respective hours of operation.⁷

METRO states that, under the agreement, it is responsible for maintaining the southern and middle segments to a minimum of FRA Class 1 condition, while W&LE is responsible for routine and non-routine maintenance of all appurtenances and devices located within the right-of-way of the southern and middle segments used solely by W&LE for freight rail operations. Furthermore, METRO's maintenance activities are subject to W&LE's right to inspect and to request METRO to promptly cure any track defects; if METRO fails to correct such defects, W&LE may perform the necessary maintenance, provided that W&LE gives METRO 72 hours' advance written notice. Finally, W&LE has the right to make emergency repairs that are reasonably necessary for conducting its freight service without prior notice to METRO.

⁷ METRO states that, upon execution of the agreement, it designated Cuyahoga Valley Scenic Railroad as its agent to fulfill its responsibility to coordinate and control excursion train passenger operations on the southern and middle segments during the passenger window.

On July 31, 2003, METRO filed an amended motion to dismiss its notice of exemption in order to supplement and amend the record and to reflect its new shared use agreement with W&LE. It states that the agreement resolves W&LE's concerns that led it to oppose the May 24, 2000 motion to dismiss.⁸ On August 1, 2003, W&LE filed a letter requesting leave to withdraw its opposition to METRO's motion to dismiss, stating that, in fact, its agreement with METRO has resolved its concerns.

DISCUSSION AND CONCLUSIONS

The question here is whether the Board's regulatory approval is required for METRO to acquire the subject line. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). The Board's authorization is not required, however, when the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine at 836-37.

The record shows that CSXT did not transfer common carrier rights or obligations to METRO in 2000. When METRO acquired the line from CSXT on May 31, 2000, it did not acquire the right or the obligation to provide common carrier freight service over the line – CSXT and W&LE retained all common carrier obligations. Nor did METRO, when it acquired the line, hold itself out as a common carrier performing rail freight service on the subject line. The new shared use agreement between METRO and W&LE shows that METRO will provide passenger service over the line, W&LE will retain the property and contract rights required to conduct freight operations, and METRO will not have the right or ability to materially or unreasonably interfere with W&LE's freight operations. METRO has not conducted freight operations on these segments and will not hold itself out as willing or able to do so. As such, METRO did not become a rail carrier subject to the Board's jurisdiction as a result of the 2000 acquisition transaction. Under these circumstances, this transaction does not require Board action, and the Board will not exercise jurisdiction over the transaction.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. W&LE is granted permission to withdraw its opposition to the motion to dismiss.

⁸ In support of its position that its acquisition of this line from CSXT is outside the Board's jurisdiction, METRO cites Maine, DOT-ACQ. Exemption, ME Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

2. METRO's motion to dismiss its notice of exemption is granted.
3. The proceeding is discontinued.
4. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary